No.

OCT 9 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

ERNEST INFELICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner,

VS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Ernest Infelice, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The order of the Court of Appeals, unpublished pursuant to Seventh Circuit Rule 28, is reprinted as App. A, *infra.*

Jurisdiction

The order of the Court of Appeals was entered on August 8, 1974. Petitioner's petition for rehearing en banc, timely filed, was denied on September 11, 1974. (App. B) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Where the prosecution's case against petitioner was wholly dependent upon the testimony of an informant whose in-court testimony was substantially impeached by tape recordings properly in evidence, did not the trial court use an improper standard in evaluating the evidence by disregarding the tapes in order to convict petitioner; and under such circumstances, was not the evidence insufficient, as a matter of law, to support conviction?

2. Did not the trial court abuse its discretion in denying petitioner's motions for polygraph testing, in view of the head-on conflict between the testimony of the informant and that of petitioner, and in light of the fact that the tapes impeached the informant? And are not these such "special circumstances" that the court's refusal to order polygraph testing amounted to an abuse of discretion and a denial of petitioner's right to a fair trial?

3. Was heroin a prohibited controlled substance on any of the dates in question?

A. Did the Attorney General fail to update and republish the schedules of controlled substances as required by law, 21 U.S.C. 812(a), and if so, may petitioner be convicted consistently with due process of law, where the mandatory republication provisions were disregarded?

B. Even if republication was not required until the date deemed necessary by the Court of Appeals (April 27, 1972), can petitioner stand convicted upon Count 4 for a substantive offense on that very date, where the republication in fact was accomplished on May 12, 1972, purportedly nunc pro tunc as of April 27, 1972? Does not such retroactive application to petitioner of the untimely republished schedules amount to a violation of his due process rights

and a violation of the constitutional prohibition against ex post facto laws?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . in any criminal case . . . be deprived of life, liberty or property, without due process of law. . . ."

Article I, Sec. 9, clause 3 of the United States Constitution provides in pertinent part:

> "No . . . ex post facto law shall be passed."

21 U.S.C. 812(a) provides as follows:

> "There are established five schedules of controlled substances, to be known as schedules I, II, III, IV and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

Provisions of the Federal Register Act, 44 U.S.C. 1501 through 1511, pertinent to Point 3 of this Petition, are quoted and referred to therein.

STATEMENT OF THE CASE

Petitioner, Ernest Infelice, was convicted in a bench trial upon a four-count indictment (73 CR 106) of conspiracy (under 18 U.S.C. 846) to distribute and possess heroin with intent to distribute in violation of 18 U.S.C. Sec. 841(a)(1) (Count 1); and of distributing two separate quantities of heroin on April 14, 1972 (Counts 2 and 3), and another quantity on April 27, 1972 (Count 4), such

substantive offenses being in violation of 18 U.S.C. 841 (a)(1). (A. 1)[1]

The entirety of the government's case against petitioner depended on its witness Robert Burks, who had been convicted previously of a number of crimes, both federal and state, and who had met petitioner and a defendant, McGarry, (found not guilty) while they were all inmates at Leavenworth penitentiary. Burks became an undercover informer for the government, and as such, was equipped with Kel-set recording devices.[2]

At trial, Burks testified he had conversations with petitioner at McCormick Place, Chicago, where petitioner was employed as a dock hand. The first meeting with petitioner on October 21, 1971 was happenstance. (Tr. 401) Burks had come to meet Mario Garelli, a defendant, at McCormick Place, and went there at the suggestion of Brown, another defendant (whose trial was severed). He had met with Mario Garelli a day before (Tr. 301) his accidental meeting with petitioner. On some of the occasions he saw petitioner, he was equipped with a Kel-set device, and on others, there was none. A chronological list of dates of meetings, what was allegedly said by petitioner according to Burks' in-court testimony, and whether or not such matter appeared on the tapes, or in the transcripts of said tapes, is set forth at App. C, *infra.*

Petitioner's pre- and post-trial motions for polygraph testing were denied. (R. 20-21, 79) The court also denied

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[1] "A." refers to petitioner's Appendix filed in the Court of Appeals; "R." to the Record of Appeal filed in that court; "Tr." to the transcript of proceedings at trial.

[2] The government introduced as evidence of their contents (Tr. 1832; A. 11) tape recordings of a number of conversations held between government witness Burks, petitioner, and others. The tapes were made by use of a Kel-set radio transmitter concealed on Burks' person, and the transmitted conversations were taped by officers from radio receivers picking up the same frequency. (Tr. 695-99).

his motion to dismiss the indictment for failure to state an offense because of official non-compliance with the republication requirements of 21 U.S.C. 812(a). (R. 28-29) Petitioner's post-trial motions for new trial in arrest of judgment also were denied. (R. 76)

The indictment charged that petitioner, together with Mario and Chester Garelli, Frank Sarris, Ernest Brown and James McGarry, conspired to distribute and to possess heroin with intent to distribute, and charged petitioner, the two Garellis and Sarris in 3 additional counts with distributing heroin on April 14 and on April 27, 1972.

Chester Garelli and Frank Sarris pled guilty during the course of the trial (R. 54-56); McGarry was found not guilty at the close of the government's case (R. 69-70); and Brown was severed before trial. The remaining defendants, petitioner and Mario Garelli, were tried to the court, without a jury, and were found guilty on all four counts. (R. 72)

Petitioner was sentenced to 10 years imprisonment on each of the four counts, said sentences to run concurrently, with additional provisions for mandatory parole periods of 3 years upon each of the three substantive counts, said parole terms to run consecutive to one another. (R. 90)

Because of the issues involved, petitioner was permitted to remain on bond pending appeal, and the Court of Appeals granted his motion to stay the mandate after affirmance pending the outcome of the instant Petition.

The trial court's comments in rejecting the tapes after they had been received in evidence.

"The result of the foregoing is a gnawing feeling of unreliability as to the Kel-set tapes. To me as a fact finder,

they were scant value, and I have virtually disregarded them.

But accepting them for the moment as evidence of the contents of conversations between Burks and Mario Garelli, or Infelice, as the case might be, it seems to me that in certain instances at least they cut against the Government's case and contradicted it.

The Government understandably argues that the absence of incriminatory conversation on the tapes should not be construed as evidence that the conversation did not take place.

But the Government chose to offer the tapes not only as a circumstance corroborating Burks' in-court testimony that he had had a conversation on a given date, but also to prove part of the contents thereof.

At the time the offer was made, I made clear to the Government what I regarded to be the consequences of the offer. Counsel persisted.

Perhaps I am too simplistic in my analysis, but it seems to me that if the presence of words on the tape is evidence that they were spoken, the absence of words on the same tape is evidence that they were not. And this is particularly so when no explanation for the silence and hisses is offered." (A. 11-12)

REASONS FOR GRANTING THE WRIT

Prefatory Statement

As noted by the Court of Appeals, "The Government's case was built upon the testimony of an informer, Robert Burks." (App. A 3) Petitioner contended on appeal that in view of the evidence presented by way of tape recordings of various conversations which Burks allegedly had with petitioner and with certain co-defendants (not parties to the instant Petition), which contradicted and impeached Burks' in-court testimony, the evidence was insufficient to sustain the convictions, and that the trial court's acceptance of Burks' in-court testimony in the face of the impeaching tapes, which the court rejected, amounted to application of an improper standard in evaluating the evidence. The court disagreed, concluding that the trial court's reliance on Burks' in-court testimony to sustain conviction was justified because of the court's exclusive province in determining both the credibility of the witness and the probative weight to be afforded the tapes. (App. A 10).

Because of the unusual situation—that is, head-on-conflict between the testimony of Burks and that of petitioner, and tapes having been admitted into evidence which impeached Burks—petitioner further contended that the trial court's denial of his pre- and post-trial motions for polygraph testing constituted an abuse of discretion. The reviewing court deemed denial of the motions to have been appropriate within the court's discretion. (App. A 12).

Petitioner further contended that because of official noncompliance with the mandatory updating and republication provisions regarding schedules of controlled substances, heroin was not in fact a controlled substance at the times covered by the indictment. The Court of Appeals disagreed with petitioner's interpretation of the statutory mandate, concluding that republication was in fact accomplished in accordance therewith. (App. A 11-12).

Petitioner seeks a writ of certiorari concerning each of the foregoing contentions, and suggests by way of the arguments which follow that the questions concerning the validity of the schedules of controlled substances, the propriety of disregarding tapes which substantially impeach the government's crucial witness and accepting instead his in-court testimony to sustain conviction, and the extent of permissible discretion to deny motions for polygraph tests in such a case, constitute important questions of federal law within the meaning of Supreme Court Rule 19(1)(6) which have not been, but should be, resolved by this Court.

1.

Because tapes of Kel-set recordings of conversations between government witness Burks and petitioner, which had properly been admitted into evidence, substantially contradicted and impeached Burks' in-court testimony, the court used an improper standard in evaluating the evidence by disregarding the tapes in order to convict petitioner, and the evidence was insufficient, as a matter of law, to convict. Certiorari should be allowed to resolve this question because of the widespread use both of undercover informants and of electronically recorded evidence in federal criminal trials.

The reviewing court apparently accepted the government's position that only credibility was involved; that the trial court could, in its judgment, relegate little, if any, probative value to the tapes and instead believe the in-court testimony of the government's informant and sole occurrence witness—upon whose testimony petitioner's conviction must stand or fall—despite the fact that the tapes, which had been offered by the government both as independent evidence and as corroborative of Burks, (A.

11) substantially impeached Burks, both by way of affirmative contradiction and by total absence from the tapes of the only portion of Burks' in-court testimony implicative of defendant. (App. A 6-10)

The existence of the tapes offered by the government and admitted as evidence by the court, in the factual posture of this case, removes the issue from the simple realm of "credibility," and renders the court's utter disregard of the tapes and their impeachment value in order to convict petitioner wholly improper, reversible error. Moreover, in the light of the tapes, the evidence was insufficient, as a matter of law, to sustain petitioner's convictions.

What Burks testified Infelice said of an incriminatory nature does not appear on the tapes. The trial judge recognized that this constituted evidence which impeached Burks, for he stated:

> "[*I*]*t seems to me that if the presence of words on the tapes is evidence that they were spoken, the absence of words on the same tape is evidence that they were not.* And this is particularly so when no explanation for the silence and hisses is offered." (A. 12) (Emphasis added).

Moreover, certain of the matters implicative of petitioner testified to by Burks were contradicted affirmatively by the tapes. (See App. C)

Although portions of the tapes of Kel-set conversations were partially inaudible, particularly in that unexplained silences, hisses and beeps occur, and although the tapes had been "re-recorded" to filter out background noise, the tapes were admitted as evidence (Tr. 1861-62) both of their contents and as corroborative of Burks' in-court testimony. (A. 11; App. A 6). Such admission was clearly proper. *United States v. Madda,* 345 F.2d 400 (7 Cir. 1965), and indeed the Court of Appeals tacitly assumes the propriety

of admitting the tapes as evidence despite their evident incompleteness.[3]

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[3] This view is accepted among the Circuits. See, *e.g.*, the following cases, all holding partially inaudible Kel-set or directly recorded tapes admissible over defense objection, so long as the inaudible part does not render incomprehensible that which is audible: *United States* v. *Carlson*, 423 F.2d 431, 440 (9 Cir. 1970) (tapes of defendant's meeting with "wired witness" held admissible over defense objection that tapes were partially inaudible; affirmed); *United States* v. *Weiser*, 428 F.2d 932, 936-37 (2 Cir. 1969) (approved admission of tapes; "That some portions of the tapes were inaudible does not necessarily render the entire conversation inadmissible."); *Gorin* v. *United States*, 313 F.2d 641, 651-52 (1 Cir. 1963) ("While it appears that parts of them are inaudible, we cannot say that the parts which are not are without evidentiary value, or that the inaudible parts are so substantial as to make the rest more misleading than helpful."); *Byrnes* v. *United States*, 327 F.2d 825, 835-36 (9 Cir. 1964) ("Because a bit of evidence is so poorly prepared as to be 'unintelligible,' or 'indistinguishable' may persuade counsel proposing to use it not to do so; but such facts alone do not make it inadmissible if it has, in the opinion of the trial court, any probative value whatsoever. And in determining whether it does have such evidentiary value . . . the wise trial judge exercises a liberal discretion [in favor of admission of the evidence.]"); *United States* v. *Avila*, 443 F.2d 792, 795-96 (5 Cir. 1971) ("tape recordings which are partially inaudible are not inadmissible per se unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy."); *United States* v. *Hall*, 342 F.2d 849, 852-53 (4 Cir. 1965) (approving admission of tape which was 25% inaudible); *Addison* v. *United States*, 317 F.2d 808, 815-16 (5 Cir. 1963) (approving admission of tape, approximately one-half of which was "defective"); *Cape* v. *United States*, 283 F.2d 430, 434-36 (9 Cir. 1960) ("But whether the recording is treated as independent or merely corroborative evidence, the test of admissibility is basically the same, and where, as here, it is clear that the inaudible portions ar not substantial and do not render the audible parts unintelligible, the recording is admissible for either purpose"; af-

(Footnote continued)

Once evidence has been admitted, and it is—as here—relevant, legal, and proper evidence, the court cannot simply disregard it, where to regard it renders unbelievable the witness' in-court testimony. The court could not believe both the tapes and the witness; so he chose to disregard the properly admitted tapes.

A trial court may not indulge in such practice; yet the panel approved the judge's choice not to consider the tapes at all—"I have virtually disregarded them." (A. 11) *Cf. Gee Chee On v. Brownell,* 253 F.2d 814, 817 (5 Cir. 1958); *Yip Mie York* v. *Dulles,* 237 F.2d 383, 385 (9 Cir. 1956); *Ramsey* v. *United States,* 263 F.2d 805 (9 Cir. 1959), all to the effect that a trial court may not arbitrarily disregard evidence.

Had this case been tried to a jury, clearly the court could not withdraw from the jury's consideration, properly admitted, relevant evidence. *United States* v. *Bourjaily,* 167 F.2d 993, 995-96 (7 Cir. 1948); *United States* v. *Michener,* 152 F.2d 880, 884-85 (3 Cir. 1945). Yet, sitting, as trier of fact, he permitted himself to do what he could not direct a jury to do.

Suppose in a jury trial, with the same evidence, that the jury had rendered a verdict against petitioner and the court had directed them to disregard the tapes. Suppose further, that the jurors report, after verdict, that they would have acquitted petitioner if they had been permitted to consider the tapes, which impeached the witness, but felt bound to convict him because the court had ordered

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(Footnote continued)

firmed). See also *Walker* v. *State,* 222 So.2d 760 (Fla. Crim. App. 1969) (that tape was inaudible in 150 places did not render it inadmissible), and, see Annot., *Omission or Inaudibility of Portions of Sound Recording as Affecting its Admissibility in Evidence,* 57 A.L.R.3d 746 (1974).

them to disregard the tapes. Assume also that, as here, the tapes were properly admitted as evidence. Is there any doubt that such verdict would necessarily be overturned?

The identical situation here obtains, with the judge sitting as trier of facts. And similarly his improperly reached decision should be reversed.

Indeed, there is even more reason to reverse the judge's ruling, in that the common law rule permitting compromise verdicts by juries does not apply where the judge is the fact-finder. It is essential that the judge be consistent with himself. Where, as here, he reached consistency (*i.e.*, a guilty verdict) only by utterly disregarding proper, competent, legally admitted evidence, such apparent consistency is a fiction and a sham, and must fall under the rule requiring judicial consistency. *United States* v. *Maybury*, 274 F.2d 899 (2 Cir. 1959).[4]

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[4] Although logically inconsistent jury verdicts are permitted because of the "special considerations relating to the nature and function of a jury," *United States* v. *Maybury*, 274 F.2d 899, 902 (2 Cir. 1959), and see *Dunn* v. *United States*, 284 U.S. 390, 393-94, a different rule controls where defendant is tried by the court without a jury.

In *Maybury*, the court rejected the rule of inconsistent verdicts in non-jury trials. After discussing the special considerations permitting inconsistent jury verdicts, the court explained why such reasons are inapplicable to a bench trial. The court stated:

> "None of these considerations is fairly applicable to the trial of a criminal case before a judge. There is no 'arbitral' element in such a trial. While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country,' even when he sits in the jury's place. . . . We do not believe we would enhance respect for law or for the courts by recogniz-

(Footnote continued)

As this Court has recognized:

> "An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. . . . [And while such considerations do not normally aid a defendant,] we are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question." *United States* v. *White,* 401 U.S. 745, 753.

As a practical matter, the government ordinarily seeks to use taped or electronically recorded evidence of clandestine conversations involving undercover agents or informants (such as Burks) because such a witness' testimony is frequently suspect; and in the instant case, the government realized that without independent corroboration of Burks' testimony, no tenable case could be presented. (Tr. of Oct. 19, 1973, pp. 21-22) In the case at bar, Burks' testimony is highly suspect because of his extensive prior criminal record and unsavory background, his financial

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(Footnote continued)

> ing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges that, for historic reasons, has been granted the jury. *United States* v. *Dotterweich,* 1943, 320 U.S. 277, 279, 64 S. Ct. 134, 88 L.Ed. 48. We know the role of logic in law is not unlimited; but 'Holmes did not tell us that logic is to be ignored when experience is silent.' Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail." 274 F.2d at 903.

Thus, even if by some stretch of the imagination it be concluded it would not be improper for a jury to disregard the tapes in evaluating Burks' credibility, the foregoing rule and logic should eliminate any such argument where a judge, alone, is the trier of facts.

interest in the case,[5] and his personal obligation for the narcotics officers' intervention on his behalf in an unrelated state criminal case.[6] (A. 13, 19)

Burks' testimony was not corroborated by anything in the record, as to the supposed incriminatory conversations with petitioner.[7] The tapes do not corroborate him, even if they be considered, which they were not, and even the government agent who sought to corroborate a conversation which was not taped was disbelieved by the judge. (A. 19) (See App. C 18-19)

Thus, of the *sole* conversation in which petitioner is supposed to have made an important admission against interest regarding his narcotics involvement, there is no corroboration at all; no tape, and a disbelieved narcotics agent.

But the court treated Burks' testimony as though no tapes impeaching and contradicting him were in evidence. The court should have ruled in favor of petitioner's motion for acquittal at the close of the government's case (A. 2), because at that time, the court had not yet improperly

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[5] Burks was paid a total of $17,000 by the government for his "cooperation," more money than he had ever earned legitimately in his life. (A. 13)

[6] One of the federal agents with whom Burks was "cooperating" arranged to assist him on a State pandering charge in Indiana (while the present case was still being prepared by the government); the assistance included securing his release on his own recognizance on the Indiana charge. (A. 19)

[7] "The Court: But we got to Mr. Echeles' argument that there is virtually no implicative language on the tapes with regard to Infelice.

Mr. Marrs (Asst. U.S. Atty.): That's correct." (Tr. 2243; *Cf.* Tr. 2253)

disregarded the evidence of the tapes. That is, in considering the government's case when it rested, the only decision the court could make was acquittal, there not being "substantial evidence which amply supports the district court's denial of defendant's motion for judgment of acquittal." *Cf. United States* v. *Williams*, 311 F.2d 721, 723 (7 Cir. 1963).

In *Hinton* v. *United States*, 196 F.2d 605 (D.C. Cir. 1952), the judge allowed the cases to go to the jury, notwithstanding he considered them "very weak on the evidence." The appeals court reversed because, in their opinion, there was reasonable doubt of guilt. "It is, of course, true that sufficient contradiction of the government's sole eye-witness is not always fatal to the government's case for circumstances may prove a defendant guilty beyond reasonable doubt. But there are no such circumstances here."

Similarly, in the case at bar, there are no other circumstances than Burks' testimonial accusations contradicted by the tapes which had, as their initial purpose, a corroborative intent.

Also to be considered is Burks' remarkable ability to imitate voices other than his own. In taped phone conversations, Burks admittedly simulated the voices of McGarry (Tr. 1603-6), Sarris (Tr. 1613, 1622) and a woman (Tr. 1607). That he did so, shows what a liar he is, and makes it even more important that his testimony should not have been considered without simultaneous consideration of the impeaching tapes.

Certainly, if instead of tapes (which the courts have stated are more reliable than the witness' in-court testimony) the impeaching and contradicting evidence were contained in Grand Jury minutes, could the trial court ignore such impeachment material, absent some credible explana-

tion by the government? As the government has a duty to explain discrepancies between trial and grand jury testimony, *United States* v. *Spangelet,* 258 F.2d 338, 342 (2 Cir. 1958), how could they be excused where recorded tape testimony is more reliable than the witness' recollection and where the absence of alleged words spoken on the tape constitutes evidence of their not having been uttered? (A. 12) [8]

From all the foregoing, it is clear that:

(1) the tapes were properly admitted in evidence;

(2) while admitted in an attempt to corroborate Burks' testimony and as independent evidence of the contents of the conversations, the tapes actually contradicted and impeached him;

(3) the court arbitrarily disregarded the tapes, choosing to believe Burks without the inconvenience of having to reconcile his testimony with the tapes;[9] and

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[8] The explanation offered by the government of the tapes, insofar as petitioner is concerned, was merely that it is one of the "mysteries of the universe." (A. 10) Not only was it a "mystery" that incriminatory words or statements were missing from the tapes, but according to one of the prosecutors, it was "tragic" that words allegedly spoken were not on the tape. (Tr. 2151) (The omitted word on the tape in this instance characterized as "tragic," was the significant word, "dope.")

We submit that the "mystery" of the tapes and the "tragic" matter of the absence of incriminatory words, phrases or sentences, all add up to reasonable doubt that Burks' recollection of those conversations with petitioner occurred in the manner stated by Burks.

[9] Moreover, the prejudicial effect of the court's determination to disregard the tapes was enhanced by the court's refusal to permit petitioner to submit to a polygraph test (See Point 2 of this Petition) either before or after trial. It is thus impossible for a defendant to

(Footnote continued)

(4) under these peculiar circumstances then, the court should have allowed the motion for acquittal. (A. 2)

Indeed, that many similar cases presented by the government depend upon testimony of informants of like character results in the necessity for presenting corroboration of their testimony, often in the form of tapes or other electronic means. And where such evidence exists it must be introduced. *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971).[10] Hence this Court should rule on the proper judicial approach in such cases where the tapes and the informant's testimony do not agree. The situation is not unique—it poses a serious question of great importance to the administration of justice in this country. The instant decision appears to be the only one in which this precise problem occurred, but the general problems involved where tapes must be presented to corroborate an otherwise non-credible informant witness arise often, and there is no judicial expression by this Court for the guidance of District Judges faced with this situation in the trial of federal criminal cases.

Certiorari should therefore be allowed.

(Footnote continued)

protect himself against a false accusation—he may not attempt to enhance his own credibility by use of the polygraph, yet he has no way to defend against a witness who says the defendant made certain statements in a recorded conversation, which statements "mysteriously" do not appear on the tapes. For the court in this instance arbitrarily to disregard the evidence of the tapes under such circumstances is prejudicially erroneous.

[10] Moreover, where, as here, the tapes constitute evidence tending to prove a defendant's innocence, they must be produced under the rule of *Brady* v. *Maryland,* 373 U.S. 83.

2.

Under the circumstances of this case, the court's denial of petitioner's pre- and post-trial motions for polygraph testing of himself and of the government witness amounted to an abuse of discretion, depriving petitioner of a fair trial. Certiorari should be granted so that this Court may set forth guidelines for federal trial judges confronted by such motions, and may speak to the permissible limits of judicial discretion in such situations.

As has been pointed out elsewhere in this Petition, absent from the tapes were the incriminatory portions of Burks' testimony concerning statements allegedly made to him by petitioner. Statements which Burks testified petitioner had made to him simply were not on the tapes. [11]

Faced with the task of proving his innocence in the face of Burks' accusations, petitioner moved the court to appoint a polygraph examiner to conduct examinations upon himself and the principal government witness. (Pretrial motion, A. 1, R. 20; post-trial motion, A. 3, R. 79) Both motions were denied.

In the factual context of this case, such denial constituted prejudicial error and was an abuse of the trial court's discretion.

The reviewing court concluded that the judge had discretion to deny the test, noting that neither petitioner nor the panel had found any cases "that hold that the refusal to order a polygraph examination is an abuse of discretion." (App. A 12)

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[11] See App. C.; see pp. 8-9, *supra.*

The Court of Appeals apparently failed to perceive the import of the peculiar factual circumstances here, concluding that because the judge possesses discretion in this regard, it was properly exercised by denial of petitioner's motions. The court made no attempt to justify the judge's action as being a proper exercise of his discretion under the circumstances, but rather, merely concluded that since it is discretionary, the discretion was properly exercised.

The absence of any reported decisions holding denial of polygraph testing an abuse of judicial discretion has no bearing on the determination whether in this particular case the court's discretion was properly exercised.

Petitioner was not asking the court to enter an unprecedented order. Several federal district courts elewhere have permitted polygraph testing under controlled conditions. See, *e.g., United States* v. *Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972); *United States* v. *Hart*, 344 F. Supp. 522 (E.D. N.Y. 1971).

Indeed, the court in the instant case recognized that the trial court has discretion to grant the motion and appoint a polygraph examiner. (App. A 12)

The Court of Appeals has previously recognized that special circumstances can justify, not only admission of polygraph test results, but even appropriation of government funds for such testing. *United States* v. *Penick*, 496 F.2d 1105, 1109-10 (7 Cir. 1974). (See App. A 12)

We submit that the special circumstances herein, involving the impeachment of the government's sole and only incriminating witness by tapes of the alleged transactions, are substantially similar to those special cirmumstances

surrounding Count I in *Penick, supra,* which impelled the trial judge to grant funds for such testing and to admit the results, and which caused the reviewing court to approve such decision. In each case, doubt as to the informer's credibility constituted the "special circumstances"; in *Penick* the doubt exists because of lack of surveillance, and in the case at bar because of the impeaching tapes. The Seventh Circuit has thus held that such special circumstances justify admission of polygraph test tesults and that this lies within the discretion of the trial court. We submit that this discretion was abused in the instant case.

Here we have the unique circumstance of a defendant who wishes the court to consider tapes which the government has ostensibly sought to use against him. The tapes were made and used because the government realized it had to do something to attempt to make its witness Burks' testimony appear credible. But instead of corroborating him, the tapes impeached Burks, both by inclusion and by omission. Petitioner testified, denying the sum and substance of all the incriminating particulars testified to by Burks—the government's chief and only witness as to those particulars.

Under these peculiar circumstances, the court's refusal to order petitioner and such witness to submit to controlled polygraph testing amounted to an abuse of discretion and deprived petitioner of that fair trial to which he is constitutionally entitled.

In such a case, the court should welcome any assistance in its necessary job of resolving the conflicting testimony. In view of the fact that the tapes impeached Burks, such expert assistance as is available from a skilled polygraph examiner would have been of great assistance to the court

in determining whether to believe Burks or petitioner.[12] Had there merely been head-on conflict between the two *without* the presence of the impeaching tapes, the need for such expert assistance may not have been apparent; but on the facts as they exist on this record—the head-on conflict between Burks and Infelice *plus* the tapes which impeached Burks—the case rises to such special circumstances that refusal to allow the proposed polygraph testing amounts to an abuse of the trial judge's discretion.

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[12] The testimony of a polygraph examiner is in reality opinion evidence, in that the examiner can testify only to his opinion as to whether or not he concludes the subject is or is not telling the truth. The reliability of such opinion—as with all opinion evidence—hinges upon the qualifications of the examiner. Moreover, in a field such as the detection of deception by polygraph examination, the examiner's opinion also depends upon the accuracy and reliability of the apparatus used. Petitioner submits that it is too late to contend that reputable polygraph examiners and their equipment cannot be used as a valuable adjunct to the criminal justice system (subject, of course, to cross-examination, and with the caveat that any such evidence, the basis for which is not shown to be sufficiently reliable and trustworthy, will be disregarded). See discussion in the *Ridling*, *Hart*, and *Penick* cases, cited at p. 19, *supra*.

For literature concerning the operation of modern polygraph equipment, including the physiological and psychological facts underlying the detection of deception technique, see REID & INBAU, TRUTH & DECEPTION (1966); Reid, *Judicial Recognition of the Polygraph (Lie Detector) Technique*, THE JUDGES' JOURNAL, Vol. 11, No. 1, p. 15 (Jan. 1972); Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 A.B.A.J. 1130 (1964); Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L., C. & P.S. 276 (1971).

An excellent discussion concerning polygraph bases and technique is contained in the *Ridling* case, *supra.* According to District Judge Joiner, the author of that opinion, based upon expert testimony he considered in making his ruling, no more than 6% of well-conducted tests (*i.e.,* those conducted with adequate equipment by a properly skilled examiner) result in the conclusion that the examiner cannot tell if the subject is or is not telling the truth; the remaining 94% of well-conducted tests may be interpreted either that the subject is willingly not telling the truth or that the subject is telling the truth. 350 F. Supp. at 92-93. And of the inconclusive tests (*i.e.,* 6% of the well-conducted tests) it has been suggested that many of these become conclusive one way or the other upon retesting. *Ibid.*

We are not suggesting that polygraph testing should put an end to trials for criminal offenses. Rather, we submit that where, as here, there is a head-on collision between the testimony of two live witnesses, and the tape-recorded evidence contradicts the government's principal witness as to the incriminatory particulars in question, the use of polygraph testing can assist the court—subject, of course, to rigorous cross-examination as to the qualifications of the examiner and the reliability of the equipment—in ascertaining who is telling the truth.

With polygraph testing in as high scientific repute as it is today,[13] it can only be suggested that the government's

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[13] Current practice and usage must also be considered. For example, the Illinois Legislature has recognized the widespread use and, by implication, the validity, of lie detector tests. Ill. Rev. Stat. Ch. 38, Sec. 202-1 to -30 involves the regulation of "Detection of Deception" examiners. The statutory scheme provides, *inter alia,* for licensing, registration, minimum standards, internship, and quali-

(Footnote continued)

resistance to petitioner's efforts to seek such verification of the reliability of his and the government's evidence is a result of the government's desire to convict petitioner regardless of the means.

Under such peculiar facts as are here present, competent polygraph testing can provide an invaluable aid to the judge in his difficult task.

In the case at bar, the court's refusal to permit the requested testing amounted to an abuse of discretion because of the peculiar factual setting of this case. The Court of Appeals' opinion merely rubber-stamps the trial court's decision.

Because of the extreme importance of setting out guidelines for federal trial judges to assist them in the proper exercise of their discretion when confronted by motions for polygraph testing, this issue should be decided by this Court.

(Footnote continued)

fications (including a college degree) for detection of deception examiners, and provides criminal penalties for violation of the various regulations and requirements. The very existence of such a statutory scheme implants a legislative "seal of approval" upon licensed members of the profession of detection of deception. It can hardly be argued that such approval would be granted a profession of unsavory or disreputable scientific reliability. Indeed, the standards and other regulations contained in the legislation insure that persons engaging in the detection of deception in the State of Illinois are properly qualified.

Current usage within the district wherein the trial court sits also dictates toward admissibility of polygraph testing results. (See Motion and Memorandum regarding polygraph testing, R. 29 & 79.) For example, the Chief of Police of Chicago, with the expressed approval of the U.S. Attorney's office, recently required his top aides to submit to such testing, and many resigned or were demoted as a result thereof.

Certiorari should be granted to determine whether the trial court should appoint an expert polygraph examiner licensed under the laws of the State of Illinois for purposes of reconsidering petitioner's motion for new trial, and whether petitioner should be acquitted or a new trial be had if such results indicate that petitioner's testimony is truthful or that the testimony of the informer Burks (as to the conversations he claimed took place but which were not on the tapes) is untruthful.

3.

Because the Attorney General and the Bureau of Narcotics failed to publish schedules of controlled substances as required by law, there were no valid schedules, and thus the alleged heroin was not a "controlled substance" during the time alleged in the indictment or set out in the proofs, thus vitiating petitioners' convictions. And even if republication was first required on April 27, 1972, petitioner cannot stand convicted upon Count 4 for a substantive offense on that date, where republication in fact took place at a later date; such retroactive application of the untimely republished schedules to petitioner amounts to a violation of his due process rights and of the constitutional prohibition against ex post facto laws. Certiorari should be granted so that this Court may resolve these questions of statutory construction and constitutional application which affect numerous federal criminal cases.

Petitioner was convicted of conspiracy (21 U.S.C. 846) to possess and sell heroin and with distributing heroin on April 14 and 27, 1972 in violation of 21 U.S.C. 841(a)(1).

The gist of the offenses charged in all counts (1 through 4) of which petitioner was convicted was that the substance in question was, legally, a "controlled substance."

Due to the failure of the Attorney General to comply with the statutory requirements concerning republication of lists of controlled substances, heroin cannot propertly be characterized as a controlled substance during the period shown by the proof, April 14 and 27, 1972. Therefore, no offense was or could have been committed as alleged, and petitioner's convictions should be reversed.

Under 21 U.S.C. 812, the schedules of controlled substances initially consisted of the lists published in the statute as originally promulgated. The statute became effective on October 27, 1970. (See Historical Note in 21 U.S.C.A. 812, at p. 28.) The statute establishes five schedules of controlled substances. 21 U.S.C. 812(a). "Such schedules shall *initially* consist of the substances listed in this section." (*Ibid.*, emphasis added.) The statute goes on as follows:

> "The schedules established by this section *shall be updated and republished* on a semi-annual[14] basis during the two-year period beginning one year after the date of enactment of this subchapter and *shall be updated and republished*[15] on an annual basis thereafter." 21 U.S.C. 812(a). (Emphasis added.)

The controversy in the case at bar revolves around the correct construction of 21 U.S.C. 812(a), insofar as it requires periodic updating and republications of the initially established schedules of controlled substances. As petitioner reads the statute, republication was first required one year after the statute's effective date of October 27, 1970—that is, on October 27, 1971—and at various times there-

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[14] Semi-annual means twice a year or every six months. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 787 (1972)

[15] The subsequent schedules are to be promulgated by the Attorney General, see 21 U.S.C. 11, who obviously also is responsible for the required republications.

after as specified in the statute.[16] However, the Court of Appeals read the statute not to require republication as of Oct. 27, 1971, but rather only to specify that such date be used as a starting point from whence subsequent republications must occur. (App. A 11) Thus the court concluded that the first republication was required on April 27, 1972.[17] (App. A 11-12)

From October 27, 1971 (when a full republication should have taken place, but did not) until May 12, 1972 (when full republication was made) heroin was not a controlled substance, because there were no valid schedules due to lack of republication as required during that interim. Thus, any criminal charge alleging a heroin offense between those dates must fall.

In the case at bar, the entire period of the alleged conspiracy and all the alleged overt acts (November 7, 1971, April 13 and 27, 1972, R. 1) fall within that interim period during which there were no valid schedules of controlled substances.

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[16] Under the terms of the statute itself, the schedules created therein as listed were only valid for one year from its effective date; that is, for one year from October 27, 1970; that is, until October 27, 1971.

The complete history of the [illegible] republications pursuant to the statutory scheme is as follows:

There was a full republication on April 20, 1971, effective May 1, 1971 (36 Fed. Reg. 7776, at 7802) (six months before the date required by law) and again on May 12, 1972, nunc pro tunc April 27, 1972 (37 Fed. Reg. 9545).

However, there was no full republication, *nor any republication at all*, in October 1971, as required by law. 21 U.S.C. 812(a).

[17] In reaching its conclusion, the court made no independent determination, but relied upon its own recent decision in *United States* v. *Nocar*, 497 F.2d 719, 722-23 (7 Cir. 1974), so construing the section. (App. A 11) *Nocar* is pending on Certiorari in this Court.

Pursuant to 21 U.S.C. 812(a) and 44 U.S.C. 1501 through 1511 (Federal Register Act), failure to publish a document required to be published renders the purported regulation invalid.[18] *Borak* v. *Biddle,* 141 F.2d 278 (D.C. Cir. 1944); *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954).

The mandate of publication is no mere technical requirement. Those subject to prosecution for violation of law are constitutionally entitled to know what conduct the law forbids. Indeed, this is a clear requirement of due process of law. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453; *Bouie* v. *City of Columbia,* 378 U.S. 347, 350-51. And where, as here, the *initial* schedules are as provided in 21 U.S.C. Sec. 812(a), with *specific* provision for subsequent updating and republication, those initial schedules were and could be valid only until the date of the first required republication; they lapsed by their own terms on that date.

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[18] Where, as here, republication of revised schedules is required by the terms of the statute itself, such republication must be accomplished by printing in the Federal Register. See Federal Register Act, 44 U.S.C. 1501 through 1511. Specifically, Sec. 1505(a) provides in pertinent part:

"There shall be published in the Federal Register—

. . .

(3) documents or classes of documents that may be required to be published by Act of Congress."

21 U.S.C. 812(a) undisputedly is an Act of Congress requiring publication of documents, to wit, schedules of controlled substances.

Moreover, 44 U.S.C. 1507 provides that no document required to be published in the Federal Register shall be valid as against any person not having actual knowledge thereof until copies have been filed with the Office of the Federal Register and made available for public inspection pursuant to 44 U.S.C. 1503. The logical import is that failure to publish a document required to be published renders it invalid; for without publication of a document required to be published, there is no notice, either actual or constructive. This principle has been judicially recognized in *Borak* v. *Biddle,* 141 F.2d 278 (D.C. Cir. 1944), and *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954).

Thus, by the terms of the Federal Register Act and of the Drug Abuse Prevention and Control Act, by pertinent case law, and by the requirements of due process of law, petitioner's convictions were based on non-existent provisions and should be reversed.

The panel's strained misreading of Sec. 812(a) so as to excuse non-publication as not yet having been required, based, as it was, solely upon the same conclusion having been reached by another panel of the same court,[19] should be reviewed by this Court. No reported cases were discovered from any Circuit wherein this aspect of Sec. 812(a) was construed. In view of the tremendous impact of whichever construction of the statute be adopted upon prosecutions for drug offenses allegedly occurring during the time period when, according to petitioner's reading of the statute, republication should have occurred, but did not, because of the Attorney General's failure to comply with the mandatory republication requirements which also involve due process notice requirements, construction of the statute should be resolved by this Court.

And even if the Seventh Circuit's interpretation of the first required date for republication be accepted—that is, April 27, 1972—there still is a serious question concerning the validity of the republication purportedly dated April 27, 1972, as applied to petitioner in this case. Count 4 of the indictment, upon which petitioner was convicted, alleged a substantive offense *on April 27, 1972.* (R. 1, A. 1)

The republication relied upon by the court as having been accomplished on April 27, 1972, in fact occurred on May 12, 1972, supposedly nunc pro tunc to April 27, 1972. (37 Fed. Reg. 9545). But as applied to Count 4 of this case,

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[19] See footnote 17, p. 26, *supra.*

wherein petitioner was convicted of a substantive offense involving an allegedly controlled substance *on* April 27, 1972, application of the republished schedules which were in fact republished on May 12, 1972, cannot be deemed to render the substance controlled on April 27, 1972. No matter how the publication is captioned, it in fact occurred on May 12, 1972, and cannot constitutionally be applied to conduct taking place from April 27, 1972, to May 12, 1972.

In *Hotch* v. *United States,* 212 F.2d 280 (9 Cir. 1954), the court reversed the conviction of defendant, a commercial fisherman, for having fished in certain prohibited waters, because a regulation purporting to extend the time of the limited prohibition was not published in the Federal Register, as required by law.[20] The schedules of controlled substances, like the fishing prohibition, were valid *only* until a specific date; and accordingly, petitioner, like the fisherman in *Hotch,* cannot, consistently with due process of law, be convicted of having violated a statute dependent upon the controlled nature of the substance involved *after* the date upon which the initial schedules expired. Republication amounts to an extension of the original schedules, and, like extension of the time-limited prohibition in *Hotch,* the schedules cannot be applied to conduct occurring after the expiration date where the republication (extension) did not actually occur on the date it was required.

Application to petitioner of schedules actually published on May 12, 1972, for conduct allegedly occurring on April 27, 1972—the date upo which republication (according to the panel's interpretati of sec. 812(a)) should have, but did not, occur—amounts to an ex post facto law which, of

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[20] This holding was reached regardless of whether defendant had actual notice of the extension. 212 F.2d at 284.

course, is constitutionally forbidden. United States Constitution, Art. I, Sec. 9, clause 3.[21]

Petitioner additionally argued that since republication, when finally accomplished, was done by the Director of the Bureau of Narcotic Drugs, rather than by the Attorney General, as required by law, the purported republications are wholly invalid. (21 U.S.C. Sec. 811; 37 Fed. Reg. 9545; 36 Fed. Reg. 7776) Concluding, as it did, that the republication was accomplished on April 27, 1972, the court did not reach this additional contention that republication was invalid because promulgated by the wrong person. (App. A 11-12) A similar argument impelled this Court to invalidate scores of convictions obtained through the use of illegal wiretaps, which had been "authorized" by persons other than the single person permitted by law to authorize such wiretaps. *United States* v. *Giordano,* ..... U.S. ....., 40 L.Ed.2d 341. Petitioner submits that the question whether the person who caused republication was authorized so to do, and, if not, whether this vitiates convictions obtained on the basis of substances contained on such consequently invalid schedules, should also be decided by this Court, such question not having previously been determined in any decision of which petitioner is aware, and potentially affecting many federal criminal cases.

"If there is a gap in the law, the right and duty, if any, to fill it do not devolve upon the courts." *United States* v. *Laub,* 385 U.S. 475, 486. Alternatively, if the Court

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[21] Nor is this point moot; for while petitioner received concurrent prison terms on each of the four counts for which he was convicted, he must also serve consecutive mandatory 3-year parole terms on each of the substantive counts. (R. 90, A. 3) Hence, if the conviction on Count 4 be upheld, he has an extra mandatory parole term to serve, which he would not have to serve if the judgment on Count 4 were reversed.

is judicially to rewrite the statute, then its opinion should be prospective, only.

To resolve all the foregoing important questions involving construction of federal statutes and constitutional requirements, this Court should grant certiorari.

Conclusion

> "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it's just too much. When that occurs, the law must condemn it as offensive, whether the method used is refined or crude, subtle or spectacular." Judge John R. Brown, specially concurring in *Williamson* v. *United States,* 311 F.2d 441, 445 (5 Cir. 1962).

The time has come in this case, too, when it's just "too much" and the convictions herein should be reversed, or, at the very least, remanded with directions.

If these convictions be permitted to stand, there will no longer be any minimum requirements of a quantum of proof, or a basic credibility, or of any other standard to support a conviction. All that will be required will be an arbitrary determination to accept uncritically the accusation, regardless of its source, and to reject without consideration all denials and outside circumstances inconsistent with guilt.

This petition for certiorari should be allowed in view of the extreme importance of the issues raised herein which have not been, but should be, resolved by this Court.

Respectfully submitted,

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